WISCONSIN LEGISLATIVE COUNCIL
STAFF MEMORANDUM

Memo No. 4

TO: MEMBERS OF THE SPECIAL COMMITTEE ON PERMANENCY FOR YOUNG CHILDREN IN THE CHILD WELFARE SYSTEM

FROM: Margit S. Kelley, Staff Attorney

RE: Proposals to Revise Certain Grounds for Involuntary Termination of Parental Rights

DATE: September 27, 2012

This Memo describes the specific suggestions received from committee members for revisions to certain grounds for an involuntary termination of parental rights (TPR), with a description of current law for each of those grounds.

TWO-PART FINDINGS REQUIRED TO ORDER TPR

Under current law, in order to terminate a person's parental rights, a court or a jury must first find that one or more statutory grounds exist. This fact-finding hearing is the first step of two findings that are required to be made before TPR may be ordered. Grounds may be found to exist in the circumstances of abuse or neglect of a child, and other specified circumstances including continuing parental disability, parenthood as a result of sexual assault, and commission of specified egregious crimes. [s. 48.415, Stats.]

In the second step, if it has first been determined that TPR grounds have been proven, a court must declare the parent to be unfit and then hold a dispositional hearing to determine whether or not the termination should be granted. The prevailing factor for consideration by the court at this stage is what disposition is in the best interests of the child. [s. 48.424 (3), Stats.]

In considering the best interests of a child, a court must consider, but is not limited to, the following factors prescribed in the statutes:

a. The likelihood of the child's adoption after TPR.

b. The age and health of the child, both at the time of the disposition and at the time the child was removed from the home.

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c. Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

d. The wishes of the child.

e. The duration of the separation of the parent from the child.

f. Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements, and the results of prior placements.

[s. 48.426 (3), Stats.]

CONTINUING PARENTAL DISABILITY

Current Law

Under current law, a court may order a termination of a person's parental rights if it has been found that a parent has a continuing disability. This ground requires all of the following findings:

- The parent is currently receiving inpatient treatment in a hospital or treatment facility, for mental illness, developmental disability, or other like incapacity.

- The parent has received inpatient treatment in one or more hospitals or treatment facilities for a cumulative total period of at least two of the last five years immediately prior to the filing of the TPR petition.

- The parent's condition is likely to continue indefinitely.

- The child is not being provided with adequate care by a relative, parent, or guardian.

[s. 48.415 (3), Stats.]

This section has not been revised with the state's responses to the federal Adoption and Safe Families Act of 1997 (commonly known as ASFA). The Act requires initiation of TPR proceedings if a child has been in foster care for at least 15 of the previous 22 months unless limited exceptions apply. [P.L. 105-89.]

Member's Suggestion for Committee Consideration

The committee has received a suggestion to consider revising the ground of continuing parental disability to be consistent with the ASFA timeline. Specifically, to revise the required element of proving a parent's history of inpatient treatment prior to the filing of the TPR petition from at least two of the last five years to 15 of the last 22 months.

The amendment to s. 48.415 (3), Stats., would appear as follows:

> (3) CONTINUING PARENTAL DISABILITY. Continuing parental disability, which shall be established by proving that:
>
> (a) The parent is presently, and for a cumulative total period of at least ~~2 years~~ **15 months** within the ~~5 years~~ **22 months** immediately prior to the filing of the petition has been, an inpatient at one or more hospitals as defined in s. 50.33 (2) (a), (b) or (c), licensed treatment facilities as defined in s. 51.01 (2) or state treatment facilities as defined in s. 51.01 (15) on account of mental illness as defined in s. 51.01 (13) (a) or (b), developmental disability as defined in s. 55.01 (2), or other like incapacities, as defined in s. 55.01 (5);
>
> (b) The condition of the parent is likely to continue indefinitely; and
>
> (c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.

PARENTHOOD AS A RESULT OF SEXUAL ASSAULT

Current Law

Under current law, a court may order a termination of a person's parental rights if it has been found that sexual assault resulted in the conception of the child. Conception as a result of sexual assault may be proven by a final judgment of conviction or other evidence produced at a fact-finding hearing showing that the person who may be the father committed sexual assault against the mother during a possible time of conception. The mother of the child must be afforded an opportunity to be heard on her desire for the termination of the father's parental rights. [s. 48.415 (9), Stats.]

In such cases, a court is not required to provide notice of a child in need of protection or services (CHIPS) or TPR action to a person who may be the father of a child conceived as a result of a sexual assault if a physician attests to a belief that there was a sexual assault of the child's mother that may have resulted in the child's conception. [ss. 48.27 (3) (b) 2., and 48.42 (2m) (a), Stats.]

"Sexual assault," for the TPR ground and notice exceptions, includes statutory rape of a minor under s. 948.02 (1) and (2), Stats., which could otherwise be proven by the mother and father's dates of birth.

Because the ground of sexual assault contains language that appears applicable only to a "father" who has committed sexual assault "against the mother" it has been challenged by a mother as being inapplicable to her, and by a father as a violation of the Equal Protection Clause of the 14th Amendment to the U.S. Constitution and Article 1, Section 1 of the Wisconsin Constitution. Two court of appeal decisions in Wisconsin have reached opposite conclusions on the statute's applicability in unpublished opinions that cannot be used for precedential value.

In the first case, this ground was attempted to TPR a mother. However, the District IV Court of Appeals relied on the statutory language referring to the "father" of the child and the legislative intent

reflected in the drafting request to make the ground "apply to fathers only." [*In re Quianna M. M.*, 2001 WI App 254.] In the second case, the District I Court relied on language within the statute that neutrally refers to "parenthood," and upheld the constitutionality of the statute as being equally capable of application to both fathers and mothers. [*State v. Otis G. (In re Davonta S.)*, 2008 WI App 135, ¶¶ 12-14.]

Member's Suggestion for Committee Consideration

The committee has received a suggestion to consider revising the ground of conception as a result of sexual assault to also apply to termination of a mother's parental rights, and to eliminate the requirement for a physician's statement as to a belief that there was a sexual assault in the exception for providing notice of a CHIPS or TPR action to a person who may be the father.

For the TPR ground, the amendment to s. 48.415 (9), Stats., , would appear as follows:

> (9) PARENTHOOD AS A RESULT OF SEXUAL ASSAULT.
>
> (a) Parenthood as a result of sexual assault, which shall be established by proving that the child was conceived as a result of a sexual assault in violation of s. 940.225 (1), (2) or (3), 948.02 (1) or (2), 948.025, or 948.085. Conception as a result of sexual assault as specified in this paragraph may be proved by a final judgment of conviction or other evidence produced at a fact-finding hearing under s. 48.424 indicating that the ~~**person who may be the father**~~ **parent** of the child committed, during a possible time of conception, a sexual assault as specified in this paragraph against the ~~**mother**~~ **other parent** of the child.
>
> (b) If the conviction or other evidence specified in par. (a) indicates that the child was conceived as a result of a sexual assault in violation of s. 948.02 (1) or (2) or 948.085, the ~~**mother of the child**~~ **parent who was the victim of the sexual assault** may be heard on **his or** her desire for the termination of the ~~**father's**~~ **other person's** parental rights.

For notice of a CHIPS proceeding, the amendment to s. 48.27 (3) (b) 2., Stats., would appear as follows:

> 2. A court is not required to provide notice, under subd. 1., to any person who may be the father of a child ~~**conceived as a result of a sexual assault if a physician attests to his or her belief that there was a**~~ **if** sexual assault of the child's mother that may have resulted in the child's conception **is proved by a final judgment of conviction or other evidence. A person who under this subdivision is not given notice does not have standing to appear and contest a petition under ss. 48.13 or 48.133, present evidence relevant to the issue of disposition, or make alternative dispositional recommendations. This subdivision does not apply to a person who may be the father of a child conceived**

as a result of a sexual assault in violation of s. 948.02 (1) or (2) if that person was under 18 years of age at the time of the sexual assault.

For notice of a TPR proceeding, the amendment to s. 48.42 (2m) (a), Stats., would appear as follows:

> (a) *Parent as a result of sexual assault.* Except as provided in this paragraph, notice is not required to be given to a person who may be the father of a child conceived as a result of a sexual assault in violation of s. 940.225 (1), (2) or (3), 948.02 (1) or (2), 948.025, or 948.085 ~~**if a physician attests to his or her belief that a sexual assault as specified in this paragraph has occurred or if the person who may be the father of the child has been convicted of sexual assault as specified in this paragraph for conduct which may have led to the child's conception**~~ **that may be proved by a final judgment of conviction or other evidence**. A person who under this paragraph is not given notice does not have standing to appear and contest a petition for the termination of his parental rights, present evidence relevant to the issue of disposition, or make alternative dispositional recommendations. This paragraph does not apply to a person who may be the father of a child conceived as a result of a sexual assault in violation of s. 948.02 (1) or (2) if that person was under 18 years of age at the time of the sexual assault.

PATTERN OF CHILD ABUSE; HOMICIDE OF PARENT; AND FELONY AGAINST A CHILD

Current Law

Under current law, a court may order a termination of a person's parental rights for commission of certain egregious crimes if any of the following have been found to exist: (1) the child has been subject to a pattern of physically or sexually abusive behavior that is a substantial threat to the health of the child; (2) the parent has committed homicide or solicitation to commit homicide of the other parent; or (3) the parent has committed a serious felony against the person's own child or committed child trafficking against any child. [ss. 48.415 (5), (8), and (9m), Stats.]

Each of these circumstances requires evidence of a final judgment of conviction for the crime. In order for a judgment of conviction to be considered as final under the law, the time for appeal must have expired, or, if appealed, all appeals directly challenging the parent's guilt must be exhausted. [*Reynaldo F. v. Christal M. (In re Reynaldo F.)*, 2004 WI App 106, ¶¶ 7-13.]

Member's Suggestion for Committee Consideration

The committee has received a suggestion to consider revising the grounds of child abuse, homicide of a parent, and felony against a child to allow evidence of the criminal conduct itself to be proved, as an alternative to only allowing proof by a final judgment of conviction.

For the ground of child abuse, the amendment to s. 48.415 (5), Stats., would appear as follows:

> (5) CHILD ABUSE. Child abuse, which shall be established by proving that the parent has exhibited a pattern of physically or sexually abusive behavior which is a substantial threat to the health of the child who is the subject of the petition and proving either of the following:
>
> (a) That the parent has caused death or injury to a child or children ~~**resulting in a**~~ **that may be proved by a final judgment of** felony conviction **or other evidence**.
>
> (b) That a child has previously been removed from the parent's home pursuant to a court order under s. 48.345 after an adjudication that the child is in need of protection or services under s. 48.13 (3) or (3m).

For the ground of homicide of the other parent, the amendment to s. 48.415 (8), Stats., would appear as follows:

> (8) HOMICIDE OR SOLICITATION TO COMMIT HOMICIDE OF PARENT. Homicide or solicitation to commit homicide of a parent, which shall be established by proving that a parent of the child has been a victim of first-degree intentional homicide in violation of s. 940.01, first-degree reckless homicide in violation of s. 940.02 or 2nd-degree intentional homicide in violation of s. 940.05 or a crime under federal law or the law of any other state that is comparable to any of those crimes, or has been the intended victim of a solicitation to commit first-degree intentional homicide in violation of s. 939.30 or a crime under federal law or the law of any other state that is comparable to that crime, and **either** that the person whose parental rights are sought to be terminated has been convicted of that intentional or reckless homicide, solicitation or crime under federal law or the law of any other state as evidenced by a final judgment of conviction**, or as proved by other evidence**.

For the ground of felony against a child, the amendment to s. 48.415 (9m), Stats., would appear as follows:

> (9m) COMMISSION OF A FELONY AGAINST A CHILD.
>
> (a) Commission of a serious felony against one of the person's children, which shall be established by proving that a child of the person whose parental rights are sought to be terminated was the victim of a serious felony and **either** that the person whose parental rights are sought to be terminated has been convicted of that serious felony as evidenced by a final judgment of conviction**, or as proved by other evidence**.

(am) Commission of a violation of s. 948.051 involving any child or a violation of the law of any other state or federal law, if that violation would be a violation of s. 948.051 involving any child if committed in this state.

LONG-TERM INCARCERATION OF A PARENT

Current Law

Under current law, long-term incarceration of a parent is not a statutory ground for termination of the person's parental rights. The Wisconsin Supreme Court has also specifically held under the ground of continuing CHIPS that a parent's incarceration does not itself demonstrate that the person is an unfit parent. The Court held that the U.S. and Wisconsin Constitutions require individualized conditions of return in the CHIPS order that are tailored to the circumstances, and an individualized determination of unfitness in order to terminate a person's parental rights. The Court held that substantive due process rights are violated when a person is deemed unfit solely based on the status of incarceration, without regard to actual parenting activities or the condition of the child. [*Kenosha County Dept. of Human Services v. Jodie W. (In re Max G. W.)*, 2006 WI 93, ¶¶ 46-55.]

The Wisconsin Supreme Court noted that incarceration "can and should" be considered in the TPR determination, but other factors must also be considered in the first step of declaring a parent to be unfit, such as the parent's relationship with the child both prior to and while the parent is incarcerated, the nature of the crime committed by the parent, the length and type of sentence imposed, the parent's level of cooperation with the responsible agency and the Department of Corrections, and the best interests of the child. The Court specified that these relevant facts and circumstances must be considered as they relate to a determination of the parent's unfitness in the first stage of the TPR determination, before the inquiry switches in the dispositional phase to the best interests of the child.

The U.S. Department of Health and Human Services' Administration for Children and Families (ACF) recommends that states consider whether or not to authorize TPR based on the extended imprisonment of parents. The commentary for the recommendation suggests that grounds for TPR should assure a permanent home for a child of a parent who will be incarcerated for a long period of time, taking into account the age of the child and the parent-child relationship. [http://www.acf.hhs.gov/programs/cb/pubs/adopt02/02adpt6.htm.]

According to a report from ACF's Child Welfare Information Gateway, a number of states allow a parent's incarceration for a felony conviction as a basis for involuntary TPR. The statutes generally require that the incarceration be for at least one to six years and must make the parent incapable of discharging parental responsibilities for the child. A review of the report's index of state laws shows that the following 23 states allow some form of extended imprisonment as a TPR ground: Alabama, Alaska, Arkansas, Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Iowa, Kansas, Michigan, Montana, New Hampshire, North Dakota, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Texas, Utah, and Wyoming. [*Grounds for Involuntary Termination of Parental Rights*, Child Welfare Information Gateway, February 2010.]

Member's Suggestion for Committee Consideration

The committee has received a suggestion to consider creating a ground for TPR on the basis of a parent's extended incarceration. Due to the Wisconsin Supreme Court's holding in *Jodie W.*, this ground is more likely to withstand a challenge based on constitutional due process rights if it includes the factors enumerated in that decision.

The creation of this new ground could appear as follows:

> (11) EXTENDED PERIOD OF INCARCERATION. At the time of the filing of the petition all of the following is shown:
>
> (a) The parent is incarcerated, or is substantially likely to be, for the next [three] - or - [five] years.
>
> (b) The child has been adjudged to be a child or an unborn child in need of protection or services and placed, or continued in a placement, outside his or her home pursuant to one or more court orders under s. 48.345, 48.347, 48.357, 48.363, or 48.365 containing the notice required by s. 48.356 (2).
>
> (c) The child is not being provided with adequate care by a relative who has legal custody of the child, or by a parent or a guardian.
>
> [(d) Other circumstances relevant to the parent, including:
>
> 1. Failure to maintain a relationship with the child.
>
> 2. The egregious nature of the crime committed by the parent.
>
> 3. The extended length and type of sentence imposed.
>
> 4. Failure to cooperate with the responsible agency and the department of corrections.]

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